IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

FIRST APPEAL NO. 1021 OF 2004

Krishna Appa Pedanekar & ors. ... Appellants

V/s

Parvati @ Vasanti Shankar Pedanekar & ors. ... Respondents

Shri S.B. Shetye for the appellants.

Shri K.L. Parab for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 15TH DEC., 2004.

P.C.:

1. The appellants - petitioners have preferred this appeal against the judgment and order passed by the Joint Civil Judge, S.D., Ratnagiri, on 8.8.1994 dismissing the application for seeking probate in Misc. Application No. 40 of 1991.

2. I have heard the learned counsel for both parties. Perused the record.

3. The miscellaneous application was filed under Sec.

276 of the Indian Succession Act for grant of probate of a will dated 1.4.1985 executed by deceased Appa Laxman Pedanekar in favour of the applicants. The learned Trial Judge adjudicated the application on merits and dismissed the same holding that applicants have proved that deceased Appa Laxman Pedanekar had executed a will on 1.4.1985. It was further held that the applicants have proved that deceased Appa Laxman Pedanekar had right to bequeth the suit property to them. However, it was held that applicants did not prove that non-applicant No.5 is not the legal heir of deceased Appa Pedanekar and finally it was held that the application was untenable for want of proper parties. Therefore, in other words, what was held in favour of the appellants that the will was legal and proper which was executed by Appa Laxman Pedanekar in proper manner and it was in favour of the applicants. It was further observed that deceased had right to bequeth the suit property to the applicants. Further, the reasoning adopted by the learned Trial Judge appears that he has taken the view that probate could not be granted because there was no executor appointed by the will.

In this connection, I must note that the learned Trial

Judge overlooked the basic legal position that the

probate is not required under Sec. 276 of the Indian Succession Act in the Mofussil area. In other words, the requirement of obtaining probate is compulsory if the probate is to be obtained regarding the will executed within the jurisdiction of Presidency town i.e. Bombay and three towns in the country. It was adjudicated finally by this Court in the case of **Bhagwansang Bharaji v/s Bechardas Harjivandas reported in I.L.R. Vol. VI Bom. 73.** It was observed that there is no law in force in the Mofussil which obliges a person, claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator, or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him, it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims. In other words, the provison to compulsory obtain the probate within the presidency towns is not applicable in the Mofussil of Bombay Presidency i.e. local area beyond the towns Calcutta, Madras and Bombay.

In view of this position, the learned Judge should have proceeded with question of issuance of letter of administration under the provisions of the Indian Succession Act and the question of issuance of probate was in fact irrelevant. No doubt that the applicants moved for probate, obviously due to their ignorance of this legal position but it was the duty of the lower Court to convert the application for granting of probate into a letter of administration especially when it was established that the will was genuine and was issued in favour of the applicants and the deceased had right to bequeth his property in favour of the applicants.

4. Therefore, under the circumstances, the proper course, in my view, would be to remand the matter to the lower Court for re-adjudication in order to consider whether the applicants are entitled to letter of administration on the basis of the will on record. For that purpose, the applicants-appellants are at liberty to make proper amendment by way of alternative plea in the said application.

The appellants-applicants shall move the lower Court for

such amendment which would be granted by the lower Court.

The matter shall be adjudicated by the lower Court within three months from the date of receipt of the Court writ in this regard.

With these observations, the appeal stands disposed of with no order as to costs.

Authenticated copy be supplied.

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